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No. 07-597

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In The

Supreme Court of the United States

UTILITY WATER ACT GROUP,

Petitioner,

v.

RIVERKEEPER, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF UTILITY WATER ACT GROUP

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Petitions for certiorari to review the Second Circuit's decision on cooling water intake structures for existing electric power plants were filed on November 2, 2007, by the Utility Water Act Group (UWAG), PSEG Fossil LLC and PSEG Nuclear LLC, and Entergy Corporation. On or before March 3, 2008, briefs in opposition were filed by six Northeast States (Rhode Island *et al.*), several environmental groups (Riverkeeper *et al.*), and the federal government (Federal Respondents).

Below, in accordance with Supreme Court Rule 15.6, is UWAG's reply to the briefs in opposition.

The briefs in opposition argue that the case is not ripe for Supreme Court review. Three reasons are given. First, EPA must still apply the Second Circuit decision on remand, and no one can predict how the revised rule will turn out. Second, the other parties claim there is no "clear conflict" with other circuits. Third, EPA is defending its use of cost-benefit analysis in the Fifth Circuit, and that case may provide another opportunity for Supreme Court review.

None of these reasons justifies denying the petitions for certiorari.

ARGUMENT

I. THERE IS NO NEED TO AWAIT REMAND TO SEE THE PLAIN ERROR IN THE SECOND CIRCUIT DECISION AND THE ADVERSE IMPACTS IT CREATES

Regardless of how the Phase II rule turns out after the remanded rulemaking, two things are clear now. First, whatever EPA does on remand, it cannot consider the costs of the rule *together with* the environmental (or any other) good it may accomplish. Second, EPA may not consider "restoration" (improving habitat or increasing fish by stocking), no matter how great its benefits.

The Second Circuit did more than forbid formal "cost-benefit analysis," a useful tool that can help select from regulatory options with different benefits and costs. The Second Circuit went further and forbade EPA to consider, in any way, whether it is reasonable for an industry to bear the costs of an enormously expensive technology where the additional level of control achieved is small and confers little or no environmental benefit.

In the remanded rulemaking, EPA will not be allowed to discard a technological "fix" that is wildly extravagant but saves few fish, so long as industry can afford it. This is a real-world problem, because there are many cases where fish could be saved by spending enough money, but where the fish are abundant, undesirable, or both, and saving them has no real impact on the health of the waterbody. In

the Great Lakes, for example, EPA cited a case in which a million fish were lost in three weeks (65 Fed. Reg. 49,073 n.13 (Aug. 10, 2000)). But they were almost all alewives, a nonindigenous species that entered the Great Lakes through manmade waterways from the ocean. In the 1970's states around Lake Michigan began stocking predatory fish to try to *reduce* the alewife population (see Comments of the Utility Water Act Group, Nov. 9, 2000, at 85). In other cases, the number of organisms affected is so small as to raise no plausible concern. *See, e.g.*, DCN: 1-3003-BE at 308 (1974-1975 impingement sampling at Big Rock Nuclear Station in Michigan produced 326 fish weighing 49 pounds total); DCN:1-3021-BE at 207 (1974-1975 impingement sampling at Ghent Electric Generation Station recovered only six fish).

The social and economic implications of the Second Circuit's decision are profound, because some cooling system technologies EPA may have to consider have monetary, environmental, and reliability costs that far outweigh the technology's benefits, and electric consumers and people living near power plants will bear these costs. For example, closed-cycle cooling, while perhaps marginally more effective than alternatives in many cases (at least for controlling entrainment), is vastly more expensive, often is not feasible because of site constraints, can create its own environmental and resource effects, and produces energy penalties and retrofit-related outages that will erode the reliability of the country's electric supply. As NERC, the organization responsible for ensuring the reliability of the nation's electric system, has recognized,

retrofitting power plants with closed-cycle cooling will exacerbate power supply problems, raising a real threat to electric system reliability. NERC, 2007 Long-Term Reliability Assessment 2007-2016, pp. 12, 97-98, http://www.nerc.com/~filez/rasreports.html.

II. THE CONFLICTS WITH OTHER CIRCUITS ARE CLEAR WITHOUT ELABORATION BY THE FIFTH CIRCUIT

A. Conflict with Other Circuits on EPA's Discretion to Consider Costs and "Other Factors"

Riverkeeper and the Northeast States claim there is no conflict between the two cost rules prescribed by the Second Circuit and decisions of other Circuits. EPA, on the other hand, judges there is a "tension" with the First Circuit's *Seacoast* decision (Fed. Resp. Br. 9). But this understates the problem.

First, the Second Circuit decision conflicts with *Seacoast*, which affirmed EPA's conclusion that the cost of moving a cooling water intake would be "wholly disproportionate to any environmental benefit." *In the Matter of Public Service Co. of New Hampshire, et al. (Seacoast Station, Units 1 & 2)*, NPDES Appeal No. 76-7, 1 E.A.D. 455, 1978 EPA App. LEXIS 17, 66 (August 4, 1978), *aff'd*, *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 311 (1st Cir. 1979). *Seacoast* explicitly uses the language of comparing costs to benefits, and it cannot plausibly be read any other way. Indeed it always

has been read that way. As EPA says, "EPA and other permitting authorities have understood for at least 30 years that cost-benefit analysis is an appropriate consideration" (Fed. Resp. Br. 15). As a California court said, "[o]ver the years, a standard for economic considerations has emerged, commonly referred to as the 'wholly disproportionate' test.... This standard is reflected in both regulatory and judicial decisions." *Voices of the Wetlands v. Cal. State Water Res. Control Bd.*, 69 Cal. Rptr. 3d 487, 543 (Cal. Ct. App. 2007) (citing EPA General Counsel Opinion 63, *Seacoast*, and *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 113 n.25 (2d Cir. 2007)).

In contrast, the Second Circuit categorically prohibits considering costs along with benefits. In the artificial decision making structure imposed by the Second Circuit, EPA may separately consider "costs" and environmental "benefits" (though how to do this separately is unclear), but it may not consider them together. Instead, EPA may use only two rules: (1) the cost of an alternative is too much if industry cannot "reasonably bear" it and (2) a cheaper alternative can be chosen from two equally effective ones. Nothing EPA does in the remand rulemaking can change these Second Circuit cost rules.

Second, the Second Circuit's decision conflicts with other circuits that have held that in setting technology-based standards EPA has great "discretion" in how it considers costs. In *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796-97 (6th Cir. 1995); *American Petrol. Inst. v. EPA*, 787 F.2d 965, 972 (5th Cir. 1986); *Nat'l Wildlife Fed'n v.*

EPA, 286 F.3d 554, 563 (D.C. Cir. 2002); and *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1048 (D.C. Cir. 1978), these other circuits have said that EPA is not *required* to do cost-benefit analysis.[1] The Second Circuit turns this around and says EPA is *prohibited* from doing it.

For other technology-based standards in the Clean Water Act, EPA may consider "such other factors as the [EPA] Administrator deems appropriate." 33 U.S.C. § 1314(b)(2)(B) (2000) (BAT), § 1314(b)(4)(B) (2000) (BCT). But not for § 316(b), according to the Second Circuit, if the "factor" EPA deems appropriate is considering costs and benefits together.

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[1] Riverkeeper *et al.* cite a footnote in *American Petrol. Inst. v. EPA*, 661 F.2d 340 (5th Cir. 1981), to support their interpretation of *American Textile Manufacturers Inst., Inc. v. Donovan*, 452 U.S. 490 (1981). *See* Riverkeeper Br. at 25. Far from validating their point, that footnote held that *American Textile* "does not affect" analysis under the Clean Water Act "because the statutory language varies so greatly from the OSHA standards" at issue. 661 F.2d at 355 n.36. In addition, both cases predated *Chevron*, and the Fifth Circuit later held that cost-benefit analysis is presumptively permissible. *See Sierra Club v. EPA*, 314 F.3d 735, 744 (5th Cir. 2002) ("[D]eterminations based on a cost/benefit analysis are within the EPA's discretion *unless the statutory scheme precludes such a determination*" (emphasis added)).

B. Conflict with Other Circuits on the Deference Given to EPA's Interpretation

The Second Circuit's decision conflicts, too, with decisions of other circuits on the principle of deference ordinarily given agencies in interpreting statutes under *Chevron*, especially when technical expertise is needed. *See City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 801-02 (D.C. Cir. 1998). The Second Circuit avoided *Chevron* deference by finding that EPA's interpretation of § 316(b) was not "permissible" if it used cost-benefit analysis (475 F.3d at 104 (App. 41a)) because it differed from the court's interpretation, guided by inferences from other sections (mainly Clean Water Act § 304). Thus an agency that has struggled for over three decades to implement § 316(b), a statute that requires data-intensive analysis if ever there was one, is given no deference at all even though it finds the statute ambiguous and uses its expertise to find a reasonable interpretation. If it was a *Chevron* "step two" analysis that the Second Circuit was doing, then it was misconceived. In step two a court should ordinarily defer to the agency interpretation; here the Second Circuit gave EPA no deference at all.

The Second Circuit's approach, namely discerning Congress' intent by parsing the words of related statutes (while disregarding "other factors the Administrator deems appropriate" in § 304) and rejecting the only legislative history of § 316(b) that goes to the cost issue ("commercially available at an

economically practicable cost"), overlooks the agency's need to use expertise in interpreting the statute. What Congress intended, surely, was for EPA to consider the biology, hydrology, and engineering and to set intake standards that would minimize adverse environmental impact. EPA did so, analyzing a database of 154 studies of entrainment and impingement.

The Second Circuit asked to examine the database and, having examined it, was unable to understand EPA's reasoning. The database shows that any state or federal agency charged with regulating entrainment and impingement (let alone other environmental impacts) must cope with the infinite variability of nature. What minimizes impact (even limiting "impact" to entrainment and impingement) depends on what kinds of fish live at the site, how fast they swim, whether their eggs float or sink or stick to surfaces or are deposited in nests, and what kind of water flow passes the intake. Passive cleaning of wedgewire screens, for example, works best where there are ambient counter currents. *See* 40 C.F.R. § 125.99(a)(1)(ii) (2007), 69 Fed. Reg. 41,693 col. 2 (July 9, 2004). These are matters within agency expertise to which federal courts have traditionally deferred.

Because of all the variables that affect "adverse environmental impact," agency expertise is important. Restricting the agency's consideration of technical and cost issues by rigid court-made rules is contrary to the principle of deferring to the agency's interpretation of the statute.

III. WAITING FOR SUPREME COURT REVIEW WILL BRING HARDSHIP AND WASTE

The idea that EPA should conduct another round of rulemaking using the Second Circuit's rules before the Supreme Court considers reviewing the case is a prescription for delay and wasted resources.

EPA feels that Supreme Court review is not yet needed because "it is unclear how significant the [Second Circuit] decision ultimately will prove to be" (Fed. Resp. Br. 14). The government is not concerned about several more years of rulemaking guided by an erroneous court of appeals decision. EPA proposes to have the rulemaking first and then see if the fundamental ground rules were wrong (as EPA believes they are).

The government recognizes that the Second Circuit decision will cause harm but focuses only on the uncertainty that will prevail *during the remanded rulemaking* – until EPA resolves the uncertainty by making a new rule. Riverkeeper does not see even this as a problem, regarding it as just the "status quo" that has prevailed for 30 years. Riverkeeper ignores the fact that case law and EPA guidance on which permit writers have relied for 30 years have allowed both cost-benefit balancing and restoration. The Second Circuit decision upends the status quo, creating new issues that affect hundreds of permits.

As for the decision's impact on the next Phase II rule, even if the precise terms of the final rule cannot be predicted, the harm the decision will do is foreseeable. In the original rulemaking EPA made no finding that any particular power plant could comply with the performance standards. Recognizing the wide variability of intake impacts on fish and other aquatic life, EPA set the standards as ranges and allowed safety valves to provide relief where the standards could not be met. These safety valves – habitat restoration and site-specific requirements where costs are excessive – are gone. Thus whatever the final rule looks like, it will lack two important provisions that made it workable in the first place.

The other parties propose that EPA conduct another rulemaking using legal ground rules that petitioners, and EPA as well, believe are contrary to law, ending with a court challenge when the rule using those groundrules is finalized. But the very decisions relied on by the Second Circuit say that EPA is not *required* to do cost-benefit analysis. Once EPA has completed the rule without considering costs and benefits, the discretion given to EPA decisions, discussed above, will make it difficult at best to mount a challenge. *By requiring EPA to exercise its discretion in a certain way*, the Second Circuit has erected a barrier to future judicial review.

In the meantime, while the rulemaking continues, permit writers must individually decide whether to apply the Second Circuit's interpretation of § 316(b) or EPA's. In any event they will have to

deal with the Second Circuit opinion, which the government acknowledges is a "sharp break from past practice ... for at least 30 years" (Fed. Resp. Br. 15).

Clearly the guidance of the Supreme Court is needed *now*, as the rulemaking commences, rather than after it ends. If petitioners and EPA are correct about the law, and if the Supreme Court grants certiorari at the end of the next round of rulemaking and gives the petitioners relief, there will be yet a *third* rulemaking to undo the effects of the second. The Phase II rule was published August 9, 2002, making Phase II almost six years along now. The proposal to carry out another Phase II rulemaking – based on an interpretation of the statute that the regulated industry and agency believe wrong – is folly.

IV. THE FIFTH CIRCUIT CASE DOES NOT JUSTIFY DELAYING SUPREME COURT REVIEW

The other parties argue that because Riverkeeper is challenging EPA's use of costs and benefits in *ConocoPhillips Co. v. EPA*, No. 06-60662 (5th Cir. filed July 14, 2006), a better occasion for Supreme Court review may occur when the Fifth Circuit makes its decision. EPA reasons that if the Fifth Circuit disagrees with the Second Circuit, the conflict will favor certiorari (Fed. Resp. Br. 16).

But if the Fifth Circuit agrees with EPA's use of costs and benefits and thereby splits from the Second, neither EPA nor industry will be aggrieved

by the Fifth Circuit decision. There is no precedent to suggest that they would be entitled to obtain review of the decision, in contrast to, say, *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 483 (1988) (request to dismiss or affirm rejected because petitioner did not "prevail below"). If EPA and industry prevailed in the Fifth Circuit, only Riverkeeper, which argues so hard against review now, would decide whether to seek Supreme Court review; EPA and industry would have no avenue of relief.

Given this concern, if the Court views the possibility of a Fifth Circuit/Second Circuit split as decisive to agreeing to review this case, the Court should hold this case until the Fifth Circuit issues its decision, so that both § 316(b) decisions can be considered together.

V. THE SECOND CIRCUIT DECISION WILL AFFECT MORE THAN JUST § 316(b)

The other parties claim this case is not far-reaching enough to interest this Court. The reason, they say, is that the case involves merely a single specialized section of the Clean Water Act, § 316(b) – no matter that it affects 40 percent of the country's electric supply (Fed. Resp. Br. 14).

In particular, the other parties downplay the possibility that the Second Circuit's reading of § 316(b), based on Clean Water Act §§ 301 and 304, might constrain EPA in developing and approving other technology-based standards, such as those for reducing water pollution under §§ 301 and 304.

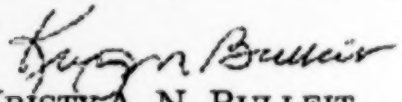
If one considers the rationale of the Second Circuit's ban on cost-benefit comparisons, it is clear that it affects § 304 standards, not just § 316(b). The decision is based on comparing "cost ... in relation to the effluent reduction benefits" in § 304(b)(1)(B) to "cost" in § 304(b)(2)(B). Why, then, would the same reasoning not apply to any "best available technology" (BAT) requirement under the latter section?

We are as ready as anyone to argue that this interpretation of § 304 is wrong and should not be precedent even in the Second Circuit. But throughout this case, Riverkeeper has argued that costs cannot be compared to benefits under § 304(b)(2)(B) and should not be under § 316(b) either. Indeed, in footnote 6 of its brief, Riverkeeper reiterates this argument, mischaracterizing the case law and wrongly claiming that this Court previously resolved the issue. There is no reason to believe the Second Circuit decision will not infect future BAT standards.

CONCLUSION

The federal government concludes that "the decision below is incorrect in important respects, and has great potential practical importance, and the government would support reversal in the event that certiorari were granted" (Fed. Resp. Br. 25). Surely this is the strangest-ever beginning to a sentence that ends "certiorari should be denied." The government is correct in all but its conclusion.

Respectfully submitted,



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